No. 20,945

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

NEIFERT-WHITE CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

REPLY BRIEF FOR THE UNITED STATES

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The single ultimate question presented by this appeal is whether the coverage of the False Claims Act extends to a false application for a Commodity Credit Corporation farm storage facility loan, as a result of which application federal monies are transferred to an individual who has no entitlement to them. Dismissing the government's complaint on the ground that the Act did not apply to the loan applications hereinvolved, the district court relied exclusively on the fact that the applications "were not claims * * * for money to which the borrowers were asserting a right based on some liability of the government to the borrowers" (R. 41). This reliance stemmed

from the court's expressed belief that "in order for there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability to the claimant" (R. 41).

In Point I of our main brief, we first pointed out (pp. 5-8) that the acceptance of this narrow reading of the Act would open the doors wide to those who would seek to obtain by deception public monies for which they do not qualify. We then demonstrated (pp. 8-20) that the district court's interpretation cannot be reconciled with either the Supreme Court's landmark decision in United States ex rel Marcus v. Hess, 317 U.S. 537 or the decisions of the at least five different court of appeals which have imposed False Claims Act liability in situations where the false claim was not based upon an asserted legal obligation of the government running to the claimant. Finally, we showed (pp. 20-27) that, properly construed, the False Claims Act plainly extends to loan applications which, as those in the present case, fraudulently induce the United States or an agency thereof, to transfer federal funds to persons havi no right -- legally enforceable or otherwise -- to their receipt.

We find nothing in appellee's brief which militates against the force of our position. Nevertheless, we think a consideration of some of the specific arguments made by appellee will serve to bring the error of the holding below into sharper focus.

1. Appellee commences its argument (Br. pp. 4-5) with a quotation from United States v. Cochran, 235 F. 2d 131, 133 (C.A. 5), certiorari denied, 352 U.S. 941, which is entirely inapposite here. In Cochran, as in United States v. McNinch, 356 U.S. 595 and United States v. Tieger, 234 F. 2d 589 (C.A. 3), certiorari denied, 352 U.S. 941, the question was whether an application submitted to the Federal Housing Administration for credit insurance in connection with a home improvement loan was a "claim" within the meaning of the False Claims Act. Unlike the loan applications hereinvolved, an application for credit insurance does not, of itself, call for the disbursement of federal funds or the transfer of federal property. The Fifth Circuit simply was giving recognition to this fact when it observed in Cochran that "neither money nor property was claimed from or against the United States."

Equally misplaced is appellee's reliance (Br. pp. 20-23) upon the Supreme Court's quotation in McNinch (356 U.S. at 599) of the Third Circuit's statement in Tieger that "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." Focusing its attention completely on the word "demand," appellee endeavors to translate this statement into a holding by the Supreme Court that to be within the False Claims Act, a claim must be founded on a legally enforceable right.

It is clear, however, that the Supreme Court did not understand the Third Circuit to have employed "demand" in the very restrictive sense suggested by appellee. In the very next sentence in the McNinch opinion, the Court gave its reason for concluding that an application for credit insurance did not come within the Tieger concept of a "claim." Even though, from the standpoint of amounting to the assertion of a legal right, an application for credit insurance addressed to the FHA is no different than an application for a farm storage facility loan addressed to the C.C.C., the Supreme Court did not find the former to be outside the coverage of the False Claims Act becaus it was not a "demand." Rather, the critical consideration, in the Supreme Court's own words, was that "[i]n agreeing to insure a home improvement loan the FHA disburses no funds nor does it otherwise suffer immediate financial detriment." 356 U.S. at 599

We stress again that, in this respect, the loan application hereinvolved are markedly different from an application for credit insurance. In agreeing to make a farm storage facility loan, the C.C.C. does disburse funds and, as pointed out in our main brief (pp. 8, 24) does suffer immediate financial detriment

2. While neither the precise holding nor the rationale of McNinch thus lends support to the interpretation given the False Claims Act by the court below, the Supreme Court's decisio in United States ex rel Marcus v. Hess, supra, cuts directly against that interpretation. Without rehearsing the discussion

of the Hess decision contained in our main brief (pp. 10-12), we wish to note that there is a total lack of substance to appellee's attempted distinction of it.

Appellee expressly concedes (Br. p. 9) that the defendant contractors in Hess had no contractual relationship whatsoever with the United States and, further, that "[t]he Federal Government was certainly under no obligation to fund the projects" in connection with which the defendants had submitted collusive bids to the sponsoring local municipalities. It contends, however, that the municipalities possessed legally enforceable claims against the government and that the contractors were held liable under the False Claims Act because their conduct had caused these claims to be false.

For present purposes, there is no need to consider the correctness of appellee's characterization of the municipalities' claims as being founded on an enforceable governmental liability. For, in any case, appellee's theory respecting the basis of the Hess decision has no foundation in the Supreme Court's opinion itself. On the contrary, the Hess opinion makes it perfectly clear that the basis of the imposition of liability upon the contractors was not that, even though the contractors could not assert a legally enforceable right against the United States, the municipalities could.

That the conduct of the contractors' came "well within the prohibition of the" False Claims Act, the Supreme Court

stated, could "best be seen upon consideration of the exact nature of [the contractors'] relation to the government." 317 U.S. 542. Continuing, the Court pointed out that, while the contracts induced by the contractors' fraud were made between the contractors and the municipalities and "payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities", at the same time (1) a large portion of the money paid to the contractors was "federal in origin"; (2) the bidding itself was a federal requirement; and (3) the contractors were fully aware of the Federal Government role in the projects (317 U.S. at 542-543). These factors, in the Court's view, were enough (317 U.S. at 544):

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States." The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The teaching of Hess is thus plain: what is important for False Claims Act purposes is not the precise legal relationship between the government and the claimant but rather whether, whatever may be that relationship, the

defendant has fraudulently occasioned -- either directly or indirectly -- the disbursement of government money or the transfer of government property. In the context of this case, to paraphrase the Supreme Court's statement in Hess, government money is as truly expended whether by grants-in-aid to states or by checks drawn directly against the Treasury to the ultimate recipient in response to an application for a low interest loan. In neither case is the expenditure based upon an assertion by the recipient of a legally enforceable right. But, in both cases, the False Claims Act reaches those who have induced the expenditure by their fraud.

3. At page 26 of our main brief, we noted that the district court had failed to cite a single decision in which the term "claim" was held not to extend to an application which had as its purpose or effect the disbursement of federal monies. The same may now be said for appellee's brief. Not one of the cases upon which appellee relies involved such a disbursement. More importantly, appellee's research -- as ours -- has apparently disclosed no case involving a disbursement of government funds in which the court attached any significance to whether the disbursement had -- or had not -- been based upon a claim of a legally enforceable right against the government.

In our main brief, however, we discussed (pp. 13-18) the several court of appeals decisions, involving the disbursement of federal funds, in which the False Claims Act was held applicabl

notwithstanding the fact that the claim was not based "on some liability of the Government to the [claimants]" (R. 42). While we think that those decisions speak for themselves, the tenuousness of appellee's attempted distinction of them is well illustrated by its treatment of Sell v. United States, 336 F. 2d 467 (C.A. 10) and United States v. Alperstein, 183 F. Supp. 548 (S.D. Fla.), affirmed, 291 F. 2d 455 (C.A. 5).

Sell, it will be recalled, involved the submission by a farmer of false applications for assistance (in the form of surplus grains)under the C.C.C. 1955 Emergency Grain Feed Progra Noting Sell's contention that applications for assistance under that program do not come within the purview of the False Claims Act, the Tenth Circuit expressed its disagreement, being "of the opinion that Sell's application of January 1, 1956, was a 'claim' as contemplated by the Act." 336 F. 2d at 474.

Appellee does not, of course, contend that Sell's applicat was, itself, "founded as of right upon the government's own liability to [Sell]." It points out, however, that, as a resul of his application, Sell was given negotiable Purchase Orders. It then reasons (Br. pp. 34-35) that "[s]ince these purchase orders were fully negotiable, the Government became liable to whomever presented them for Government owned grain. Had it not been for the fraud of Sell, the Government would not have been liable for the Purchase Orders he caused them to issue. Clearly this case involved a claim against the Government based on its liability to the claimant (i.e. the holder of the Purchase Orde

It would be a sufficient answer to this analysis that appellee is attempting to rewrite the Tenth Circuit's decision in Sell. In terms, the Tenth Circuit held Sell's application -- and not the Purchase Orders -- to be the claim. And it follows that Sell -- and not the persons to whom the Purchase Orders were negotiated -- was regarded by the court as the "claimant."

But there is a greater difficulty inherent in appellee's line of reasoning: under appellee's own theory as to why False Claims Act liability was appropriately imposed in Sell, there is similarly False Claims Act liability here. Upon his fraudulent application for emergency grain feed assistance, Sell obtained negotiable Purchase Orders; upon the fraudulent applications for loans hereinvolved, the farmers obtained negotiable checks drawn upon the Treasury of the United States. To paraphrase appellee's statement regarding Sell: "since these [checks] were fully negotiable, the Government became liable to whomever presented them for [payment]. Had it not been for the fraud of [appellee] the Government would not have been liable for the [checks] [appellee] caused [it] to issue. Clearly, this case involve[s] a claim against the Government based on its own liability to the claimant (i.e. the holder of the Treasury checks)

We hasten to stress that, notwithstanding appellee's invitation, we do not ask this Court to reverse the judgment below by holding (following appellee's reasoning) that a loan application involves a claim against the government which is based on its liability to the claimant. In our view, there can be no

question that here (as in Sell) the "claim" for False Claims Act purposes was the application, and the "claimant" the individual who submitted that application. We think it significant, however, that, in its attempt to defend its construction of the False Claims Act, appellee has been compelled to resort to an analysis which is both sophistic and self-defeating.

The untenability of appellee's restrictive interpretation of the Act is further underscored by its discussion of Alperstein v. United States, supra, involving a veteran's false application for treatment in a V.A. Hospital of a non-service connected disability. While appellee seems to accept the correctness of the Alperstein holding that the False Claims Act applies to such an application, it argues (Br. pp. 31-32) that the basis of that holding was that a veteran has a legally enforceable right to admission to a V.A. Hospital so long as he meets the eligibility requirements.

We do not think that appellee's quotation (Br. p. 31) from the opinion of the district court in Alperstein supports that conclusion. Taken in context, it seems obvious that the court was simply referring to the statutory requirement that "[t]he statement under oath of the applicant * * * shall be accepted as sufficient evidence of inability to defray necessary expenses" (emphasis that of the Court; 183 F. Supp. at 550). That the statute, even in its then form (see 38 U.S.C. (1952 ed.) 706) did not place the V.A. under a mandatory duty to give

hospital care to all eligible applicants is manifest from the qualification that the furnishing of such care was to be "within the limitations existing in such facilities."

In short, we do not believe that the Alperstein decision can be fairly read as resting upon the proposition that, by reason of 38 U.S.C. (1952 ed.) 706, the United States had a legally enforceable obligation to admit Alperstein for treatment (the breach of which would have subjected the United States to a suit to compel admission or for damages). But even assuming that Section 706 had such effect, there can be no question that 38 U.S.C. 610(a) -- which superseded Section 706 in 1958 -- does not. Section 610(a) provides that the Veterans' Administrato "within the limitation of Veterans' Administration facilities, may furnish hospital care which he determines is needed to" a veteran with a non-service connected disability who is unable to defray the expenses of necessary hospital care (emphasis supplied).

Thus, under appellee's construction of the False Claims Act, a pre-1958 application for V.A. hospital care would be a "claim" but a post-1958 application would not.

We can conceive of no better reason for rejecting that construction. Whether filed before or after 1958, the veteran's application has a single objective -- admission to a V.A. facility for free medical care. Likewise, irrespective of when filed, the application (if false) has the same effect -- the

veteran obtains, at federal expense, valuable services to which he is not entitled. In these circumstances, how can there be the adoption of any reading of the Act which puts some of these applications within the statutory coverage and leaves others free of any sanction against falsity. Stated otherwise, if Alperstein does nothing else, it demonstrates that the term "claim" cannot be given appellee's suggested meaning without rendering the False Claims Act not merely ineffective but, as well, capricious in its application.[1/]

4. Finally, little response is required to appellee's insistence (Br. pp. 26-30) that the government suffers no immediate financial detriment in connection with the making of farm storage facility loans. Indeed, we think it sufficien simply to note appellee's specific concession (Br. p. 30) that the rate of interest charged by the Government on these loans is "somewhat less than the commercial rates." Whether or not it is engaged in competition with commercial lending institutio the fact remains that the United States -- under express legislative authorization -- here lent its money for less than that money was worth. We respectfully submit that it is idle

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1/ While not of critical importance, we note in passing that appellee is entirely unjustified in criticizing (Br. p. 42) th court's reliance in United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa) upon United States v. Brown, 274 F. 2d 107 (C.A. 4). As is made clear by the discussion in Bro of the mechanics of the Commodity Credit Corporation's Tobacco Price Support Program, loans made by C.C.C. are an integral part of that program.

to contend, as does appellee, that the recipients of these loans do not receive a direct financial benefit, or that the United States is not financially disadvantaged, to the extent of the interest rate differential.

In sum, far from warranting appellee's characterization of it as "reckless" (Br. p. 44), the government's position in this Court -- that the False Claims Act applies to all fraudulent endeavors to obtain the disbursement of government funds -- is amply supported by reason and precedent. The underlying purpose of the statute, and the manner in which it has been consistently applied, plainly preclude attempts to make the Act's coverage turn upon such niceties as whether, in connection with the false representations, the claimant asserted a legally enforceable right to the funds. Nothing, we submit, could be more irrelevant.

CONCLUSION

For the reasons stated in this brief and our main brief, the judgment of the district court should be reversed and the cause remanded for trial.

Respectfully submitted,

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OCTOBER 1966.

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United Stat Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

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